No. _____

In The
Supreme Court of the United States

GEORGE L. YOUNG AND
KATHLEEN I. McCONNELL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit is incorrectly applying a plain error standard of review to sentences imposed prior to the holding in *United States v. Booker* in a manner which conflicts with the other Circuits, especially where the co-petitioners specifically objected to each applicable guideline adjustment prior to sentencing which was held prior to the *Booker* opinion?

2. Whether the District Court improperly assessed a four level upward enhancement under § 2F1.1(b)(8)(A) (2000) of the United States Sentencing Guidelines for jeopardizing the safety and soundness of a financial institution and whether this adjustment constitutes an incorrect application of the sentencing guidelines where the banks were not insolvent and never fell to the lowest composite regulatory rating?

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PETITION FOR WRIT OF CERTIORARI

George L. Young and Kathleen I. McConnell respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case.

OPINIONS BELOW

The opinion in the Court of Appeals for the Eighth Circuit affirming the sentence of the District Court is reported in *United States v. Young*, 413 F.3d 599 (8th Cir. 2005), and is reprinted in the Appendix hereto at App. 1-14.

STATEMENT OF JURISDICTION

The Court of Appeals for the Eighth Circuit entered its judgment on July 5, 2005. App. at 1. Co-petitioners, George Young and Kathleen McConnell, timely filed a petition for rehearing and rehearing en banc in the Court of Appeals for the Eighth Circuit. On August 22, 2005, the Court of Appeals for the Eighth Circuit issued an order denying both the petition for rehearing and rehearing en banc. App. at 55. The present petition for writ of certiorari is timely filed pursuant to Supreme Court Rules 13.1 and 13.3.

Petitioner George Young and Petitioner Kathleen McConnell, as parties interested jointly in the judgment sought to be reviewed, file this petition jointly pursuant to Supreme Court Rule 12.4.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to grant a petition for a writ of certiorari, filed by a party

to a federal criminal case, to review the judgment of a federal court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution which reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Sentencing Guideline § 2F1.1(b)(8)(A) (2000) which reads:

> (b) Specific Offense Characteristics
>
> (8) If the offense –
>
> (A) substantially jeopardized the safety and soundness of a financial institution;
>
> – increase by 4 levels

United States Sentencing Guideline § 2F1.1(b)(8)(A) comment. (n. 20) (2000) which reads:

> An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the

> offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

STATEMENT OF THE CASE

A grand jury indictment was returned charging Mr. Young and Ms. McConnell with two counts of mail fraud in violation of 18 U.S.C. § 1341, one count of wire fraud in violation of 18 U.S.C. § 1343, one count of making false statements in violation of 15 U.S.C. § 50 and one criminal forfeiture count in violation of 18 U.S.C. § 982. App. at 1-2.

Mr. Young and Ms. McConnell voluntarily appeared before the court and entered pleas of guilty to each charge of the indictment. App. at 1. The guilty pleas were the result of a written plea agreement between the parties and the government. App. at 1. The district court had proper jurisdiction pursuant to 18 U.S.C. § 3231, which provides that the district courts shall have original jurisdiction of "all offenses against the laws of the United States."

Mr. Young and Ms. McConnell were business associates in several businesses which primarily involved buying and selling cattle as well as cattle management. App. at 2. Mr. Young is seventy-five years old and a long-time cattle rancher. Ms. McConnell is fifty-six years old and is an accountant. Mr. Young and Ms. McConnell conducted business with individual investors who were guaranteed fixed returns. App. at 2. Following a decline in the cattle

business, co-petitioners could not meet the guaranteed rates of return to their customers. App. at 2. As a result, they began the process of engaging in fictitious transactions to satisfy their clients' demands. App. at 2. For several years, the petitioners were able to provide a return to their clients. However, the business finally collapsed in 2001. App. at 2. The co-petitioners voluntarily contacted the United States Attorney's Office for the Western District of Missouri, closed their businesses, and filed for bankruptcy protection. App. at 73.

At the time that the co-petitioners came forward, the cattle business owned approximately 17,000 head of cattle. App. at 2. Yet, they represented that they owned nearly 343,000 head of cattle. App. at 2. For guideline purposes, the loss was approximately $147 million as to individual investors. App. at 2. The banks lost approximately $36 million. App. at 2. Approximately $16 million was recovered from assets of the companies and distributed to the alleged victims. App. at 2.

Specifically, three different Nebraska banks were allegedly placed in substantial jeopardy when individual investors were unable to pay back loans after the cattle business collapsed in 2001. App. at 7. The banks allegedly placed in jeopardy included: Elkhorn Valley Bank & Trust, the Bank of Madison, and the First National Bank of Beemer. App. at 7. The Federal Deposit Insurance Corporation (FDIC) rated the banks as part of its regulatory examination process following the collapse of the business. App. at 7-8. The FDIC noted that the banks' losses, "stemmed from a high concentration of loans to a particular group of cattle buyers, but otherwise characterized the bank's management as strong." App. at 8. Co-petitioners argued on direct appeal that the practices of

bank management contributed to the bank losses. App. at 10. In other words, the misconduct of the co-petitioners was not the sole reason the banks were allegedly in jeopardy. Further, the banks never achieved a rating lower than a four.[1] App. at 8.

The court conducted a sentencing hearing on May 24, 2004. App. at 16, 36. The district court made several adjustments to Petitioner George Young's base offense level of six. App. at 3. There was an eighteen level increase for amount of loss pursuant to United States Sentencing Guideline Manual (U.S.S.G.) § 2F1.1(b)(1)(S) (2000); a two level increase for more than minimal planning pursuant to U.S.S.G. § 2F1.1(b)(2) (2000); a two level increase for using sophisticated means pursuant to U.S.S.G. § 2F1.1(b)(6)(C) (2000); a four level increase for substantially jeopardizing the safety and soundness of a financial institution pursuant to U.S.S.G. § 2F1.1(b)(8)(A) (2000); a two level increase for an offense involving the violation of a prior administrative order pursuant to U.S.S.G. § 2F1.1(b)(4)(C) (2000); and a three level decrease for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(b) (2000). App. at 3. The court then departed an additional two levels downward for Mr. Young's extraordinary acceptance of responsibility and

[1] The FDIC rates banks on a scale of 1 to 5, with 1 indicating that the bank has a strong performance and is of little supervisory concern, 2 indicating that a bank is fundamentally sound and provides no material supervisory concerns; 3 indicating some supervisory concern but failure is unlikely; 4 indicating concerns regarding unsafe or unsound practices such that a failure is a distinct possibility if weaknesses are not addressed and resolved; and 5 indicating extremely unsafe or unsound practices such that failure is highly probable. App. at 8.

extensive cooperation. App. at 3. This downward adjustment resulted in a sentencing range of 87-108 months. App. at 3. The court sentenced Mr. Young to 108 months. App. at 3. The court applied the same adjustments to Ms. McConnell's base offense level except for the two level increase for violation of a prior administrative order. App. at 3. Ms. McConnell also received a two level downward departure for extraordinary acceptance of responsibility and exceptional cooperation with law enforcement and the bankruptcy authorities, which resulted in a sentencing range of 70-87 months. App. at 3. The court imposed a sentence of 87 months. App. at 3. Co-petitioners were also ordered to pay restitution in the amount of $182,981,100.05. App. at 15-54. Co-petitioners submitted a joint sentencing memorandum objecting to all enhancements to their sentence. App. at 71-83. The district court rejected all objections to the enhancements. App. at 3.

Co-petitioners appealed to the Eighth Circuit challenging the applicability of the enhancement for substantially jeopardizing the safety and soundness of a financial institution. App. at 3. Following their plea and sentencing, but prior to their appeal, this Court issued opinions in *Blakely v. Washington*, 124 S.Ct. 2531 (2004) and *United States v. Booker*, 125 S.Ct. 738 (2005). Co-petitioners also argued on direct appeal that the application of the enhancements by the district court violated the Sixth Amendment as construed in *Blakely* and *Booker, supra*. The Eighth Circuit issued an opinion on July 5, 2005, which was reported as *United States v. Young*, 413 F.3d 727 (8th Cir. 2005) affirming the judgment of the district court. App. at 1-14. Petitioners filed a timely petition for